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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

October Term, 1946

No. 718

THE UNITED STATES OF AMERICA, APPELLANT

vs.

MICHAEL WALSH, AN INDIVIDUAL TRADING AS KELP LABORATORIES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA

FILED NOVEMBER 21, 1946

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1-15 [Names and addresses of attorneys omitted.]

16 F. D. C. No. 17829.

[File endorsement omitted.]

In the District Court of the United States within and for the Southern District of California, Southern Division

Information No. 8987

UNITED STATES OF AMERICA

v.

MICHAEL WALSH, AN INDIVIDUAL, TRADING AS KELP LABORATORIES

Viol.: U. S. C., Title 21, Secs. 331 (h); 333 (a); 342 (b) (1); 343 (a).—January Term, 1946

Information

Filed April 25, 1946

Charles H. Carr, Attorney for the United States, in and for the Southern District of California, who for the said United States in this behalf prosecutes, in his own proper person comes into Court on this — day of April, A. D. nineteen hundred and forty-six, and with leave of Court first had and obtained gives the Court here to understand and be informed, as follows, to wit:

Count One. (U. S. C., Title 21, Secs. 331 (h); 333 (a); 342 (b) (1)).

That Michael Walsh, an individual, trading and doing business as Kelp Laboratories at San Diego, State of California, the defendant herein, did, within the Southern Division of the Southern Judicial District of California and within the jurisdiction of this Court, on or about February 23, 1943, then and there, give to Richard Harrison Products of Hollywood, State of California, a guaranty in the following words and figures:

KELP LABORATORIES
MICHAEL J. WALSH
P. O. Box 146, Hillcrest Station
SAN DIEGO, CALIFORNIA, *February 23, 1943.*

To: RICHARD HARRISON PRODUCTS,
1443 North Highland Avenue,
Hollywood, California.

The undersigned Kelp Laboratories, whose address is 3564 First Avenue, San Diego, Calif., hereby guarantees that no food, drug,

device or cosmetic constituting, or being part of, any shipment or other delivery now or hereafter made to you by the undersigned will be adulterated or misbranded within the meaning of the Federal Food, Drug, and Cosmetic Act or within the meaning of any applicable state or municipal law in which definitions of adulteration and misbranding substantially the same as
17 those contained in the Federal Food, Drug and Cosmetic Act, or will be an article which may not, under the provisions of section 404 or 505 of said Act, be introduced into interstate commerce.

This guaranty shall be a continuing guaranty and shall be binding upon the undersigned with respect to all foods, drugs, devices and cosmetics shipped or delivered to you by the undersigned (including goods in transit) before the receipt by you of written notice of the revocation thereof.

KELP LABORATORIES.
(Name of firm giving guaranty.)

MICHAEL J. WALSH, *Owner.*
(Signature and title of person giving guaranty.)

Dated February 23, 1943.

That on or about February 24, 1945, on which date the said guaranty was in full force and had the same effect as though given on said date, the said defendant did deliver at San Diego, State of California for shipment to Hollywood, State of California, consigned to the said Richard Harrison Products, a number of packages, each package containing a food within the meaning of 21 U. S. C. 321 (f) (1);

That displayed upon said packages, when delivered by the defendant for shipment to the said Richard Harrison Products, as aforesaid, was, among other things, the following printed and graphic matter:

Harrison Formula B—50 10-grain Tablets

Ingredients: Vitamin B_1, Riboflavin (Vitamin G), Niacinamide, Brewers Yeast, Whey.

"See Back Panel."

Distributed By Richard Harrison, Hollywood, California.

Made under the rigid supervision of a Former University Teacher of Food Chemistry.

18 Six Tablets daily furnish 500 I. U. Vitamin B_1 2000 mmgs. Riboflavin (Vitamin G).

10 Mg. Niacinamide.

Six tablets daily supplements the diet with One & One-Half Times the minimum adult daily requirement of Vitamin B_1 and the full minimum adult daily requirements of Vitamin G.

That on or about February 24, 1945 and prior and subsequent thereto, the said Richard Harrison Products was engaged in the business of introducing and delivering for introduction into interstate commerce quantities of a food labeled as aforesaid, which had been supplied by said defendant;

That said food, when delivered by the defendant for shipment as aforesaid, to the said Richard Harrison Products, the holder of the said guaranty, was then and there adulterated within the meaning of the Act of Congress of June 25, 1938, known as the Federal Food, Drug, and Cosmetic Act [52 Statutes at Large, 1040; 21 U. S. C. 342 (b) (1)], in that a valuable constituent of said food, to wit, niacinamide, had been in whole or in part omitted and abstracted from said food, in that six tablets of said food were represented to provide 10 milligrams of niacinamide, whereas, six tablets of said food would not provide 10 milligrams of niacinamide but would provide a smaller amount of niacinamide;

That by said acts the defendant did, in violation of Section 301 (h) of said Act of Congress [21 U. S. C. 331 (h)], unlawfully give to the said Richard Harrison Products a guaranty within the purview of and referred to in Section 303 (c) (2) of said Act [21 U. S. C. 333 (c) (2)], which said guaranty was false, in that said food was guaranteed by said defendant, as of the date of shipment to the holder of said guaranty, not to be then and there adulterated within the meaning of said Act of Congress, whereas, in truth and in fact, said food was then and there adulterated within the meaning of said Act of Congress, as aforesaid;

19 All of which was and is contrary to the form of the Statute in such case made and provided and against the peace and dignity of the United States of America.

Count II. (U. S. C., Title 21, Secs. 331 (h); 333 (a); 343 (a)).

And the said Attorney for the United States, in manner and form as aforesaid, also gives the Court here to understand and be informed that Michael Walsh, an individual, trading and doing business as Kelp Laboratories at San Diego, State of California, the defendant herein, did, within the Southern Division of the Southern Judicial District of California and within the jurisdiction of this Court, on or about February 23, 1943, then and there, give to Richard Harrison Products a guaranty in the words and figures contained in the guaranty described and set forth in the first count of this information, which said guaranty in said first count described and set forth is, by reference, hereby incorporated in this count.

That on or about February 24, 1945, on which date the said guaranty was in full force and had the same effect as though given on said date, the said defendant did deliver at San Diego, State of California, for shipment to Hollywood, State of California, consigned to the said Richard Harrison Products, a number of packages, each package containing a food within the meaning of 21 U. S. C. 321 (f) (1).

That displayed upon said packages, when delivered by the defendant for shipment to the said Richard Harrison Products, as aforesaid, was the printed and graphic matter displayed upon the packages described in the first count of this information, which description in said first count is, by reference, hereby incorporated in this count.

That on or about February 24, 1945, and prior and subsequent thereto, the said Richard Harrison Products was engaged in the business of introducing and delivering for introduction into interstate commerce quantities of a food labeled as aforesaid, which had been supplied by said defendant.

20. That said food, when delivered by the defendant for shipment as aforesaid, to the said Richard Harrison Products, the holder of the said guaranty, was then and there misbranded within the meaning of the Act of Congress of June 25, 1938, known as the Federal Food, Drug, and Cosmetic Act [52 Statutes at Large, 1040; 21 U. S. C. 343 (a)], in that the statement, to wit, "Six Tablets * * * furnish * * * 10 mg. niacinamide," displayed upon the packages containing said food as aforesaid, was false and misleading in this, that the said statement represented and suggested that six tablets of said food would provide 10 milligrams of niacinamide whereas, in fact and in truth, six tablets of said food would not provide 10 milligrams of niacinamide but would provide a smaller amount of niacinamide.

That by said acts the defendant did, in violation of Section 301 (h) of said Act of Congress [21 U. S. C. 331 (h)], unlawfully give to the said Richard Harrison Products a guaranty within the purview of and referred to in Section 303 (c) (2) of said Act [21 U. S. C. 333 (c) (2)], which said guaranty was false, in that said food was guaranteed by said defendant, as of the date of shipment to the holder of said guaranty, not to be then and there misbranded within the meaning of said Act of Congress, whereas, in truth and fact, said food was then and there misbranded within the meaning of said Act of Congress, as aforesaid:

All of which was and is contrary to the form of the Statute in such case made and provided and against the peace and dignity of the United States of America.

Whereupon the said Attorney for the United States prays that due process of law may be awarded against the said defendant to make him answer the premises aforesaid.

CHARLES H. CARR,
United States Attorney.
By ROBERT KOMINS,
Assistant U. S. Attorney.

21 In United States District Court

[Title omitted.]
[File endorsement omitted.]

Motion to dismiss information

Filed June 14, 1946

The defendant, Michael Walsh, an individual, trading as Kelp Laboratories, by his attorneys, Frederick N. Kraft and Miller, Higgs, Fletcher and Glen, move that the information and each of the counts thereof be dismissed on the following grounds:

1. Neither said information nor any of the counts thereof state facts sufficient to constitute an offense against the United States.

2. The Court is without jurisdiction over said information or any of the counts thereof for the following reasons:

(a) Interstate Commerce is commerce in which the shipments cross a State line. The information contains no statement that Richard Harrison Products purchased the order for someone outside of the State of California or that it was contemplated that it would be shipped across any state line.

(b) The Richard Harrison Products does an intrastate business which may have received said product in trade, so far
22 as the information states, because it is silent as to who was to receive the shipment from Richard Harrison Products, or where it was to go.

(c) To correctly state a charge, the information should contain a statement that the shipment was intended for someone out of the State of California, and should contain the name of such person. The act provides that the offense is a "delivery for introduction into Interstate Commerce."

(d) The information does not contain any statement that said Richard Harrison Products, at the time it made the purchase from defendant, had any orders for the product in question.

(e) An offense under the act anticipates the sale to a third party other than Richard Harrison Products and/or defendant and the information contains the name of no such person.

FREDERICK N. KRAFT,
MILLER, HIGGS, FLETCHER & GLEN,
By EUGENE W. MILLER,
Attorneys for Defendant.

Received copy of the within this 14 day of June 1946.

CHARLES H. CARR, *U. S. Atty.*,
BETTY MARSHALL GRAYDON, R. M.,
Asst. U. S. Atty.,
Attorneys for U. S.

23 In United States District Court.

[Title omitted.]
[File endorsement omitted.]

Notice of motion to dismiss

Filed June 14, 1946

To United States District Attorney:

Please take notice that on June 14, 1946, the undersigned defendant filed with the Clerk of the above-entitled Court the Motion to Dismiss the Information which was on that day served upon you, and that on the 8th day of July 1946, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, at the United States District Court for the above District, Southern Division, at the Federal Building in the City of San Diego, State of California, said Motion to Dismiss will be presented to the Court.

Dated this 14th day of June 1946.

FREDERICK N. KRAFT,
MILLER, HIGGS, FLETCHER & GLEN,
By EUGENE W. MILLER,
Attorneys for Defendant.

Received copy of the within this 14 day of June 1946.

CHARLES H. CARR,
U. S. Attorney.
BETTY MARSHALL GRAYDON, R. M.,
Asst. U. S. Atty., Attorneys for U. S.

24 [File endorsement omitted.]

25 In The United States District Court for the Southern District of California, Southern Division

Honorable J. F. T. O'Connor, Judge Presiding

No. 8987 Criminal

UNITED STATES OF AMERICA, PLAINTIFF

vs.

MICHAEL WALSH, AN INDIVIDUAL, TRADING AS KELP LABORATORIES, DEFENDANT

Reporter's transcript of proceedings

Filed Nov. 19, 1946

SAN DIEGO, CALIFORNIA,
Thursday, July 11, 1946.

Appearances: For the Plaintiff: James M. Carter, United States Attorney; by Betty M. Graydon, Assistant United States Attorney. For the Defendant: Eugene W. Miller, Esq., 726 Bank of America Building, San Diego, California.

26 SAN DIEGO, CALIFORNIA,
Thursday, July 11, 1946, 10:00 o'clock.

THE CLERK. No. 8987 Criminal, United States of America v. Michael Walsh, an individual, trading as Kelp Laboratories, hearing of motion to dismiss, pursuant to notice filed June 14, 1946.

Motion to vacate plea of not guilty

MR. MILLER. We ask, if the court please, that the plea of not guilty may be vacated and this motion to dismiss heard.

THE COURT. The motion of the defendant will be granted and the plea set aside.

Argument on motion to dismiss

MR. MILLER. The information, if the court please, is one under Section 331 (h) of the Food and Drug Act for giving a guarantee provided for in 333 (c) 2, I believe, of the Act, from the manufacturer to a distributor and the information alleges that Michael Walsh, an individual, trading and doing business as Kelp Laboratories at San Diego, State of California, gave to Richard Harrison Products of Hollywood, a guarantee in words as follows:

It is the usual guarantee provided for in the Food and Drug Act under the section last mentioned to the effect that it guarantees that merchandise will not be adulterated or misbranded.

Michael Walsh is alleged to be in place of business in San Diego, California, and Richard Harrison in Hollywood, and it states that on February 24, 1945, on which date the said
27 guarantee was in full force and effect, the defendant did deliver at San Diego, State of California, for shipment to Hollywood, State of California, consigned to the said Richard Harrison Products, certain packages of food, and then it states that it was branded to be a certain amount of milligrams of niacinamide and that that particular shipment was defective in that matter.

Then it states also that on or about February 24, 1945, that is, the date of the shipment from San Diego to Hollywood and prior to that date and subsequent to it Richard Harrison Products was engaged in the business of introducing and delivering for introduction into interstate commerce quantities of food supplied by the defendant of this kind.

Then it states that this guarantee was false in that it did not contain the right number of milligrams of niacinamide and it was therefore, adulterated and the guarantee was false in that respect.

The sections we have referred to and which the court is familiar with are in the pamphlet form which I will refer to shortly.

Now, the second count is identical to the first count with the exception that it states that the guarantee was false for the reason that this particular shipment from San Diego to Hollywood was misbranded. Of course, your Honor will recall that under
28 the Barnes decision there would be just one punishment on one offense, the one guarantee that was false.

The COURT. I tried the Barnes case.

Mr. MILLER. Yes; I recall that you did. Our motion to dismiss is as follows:

1. Neither said information nor any of the counts thereof states facts sufficient to constitute an offense against the United States.

2. The court is without jurisdiction over said information or any of the counts thereof for the following reasons:

(a) Interstate commerce is commerce in which the shipments cross a state line. The information contains no statement that Richard Harrison Products purchased the order for someone outside of the state of California or that it was contemplated that it would be shipped across any state line.

(b) The Richard Harrison Products does an intrastate business which may have received said product in trade, so far as the information states, because it is silent as to who was to receive the shipment from Richard Harrison Products, or where it was to go.

(c) To correctly state a charge, the information should contain a statement that the shipment was intended for someone out

of the state of California, and should contain the name of such person. The act provides that the offense is a "delivery for introduction into interstate commerce."

(d) The information does not contain any statement that said Richard Harrison Products, at the time it made the purchase from defendant, had any orders for the product in question.

(e) An offense under the act anticipates the sale to a third party other than Richard Harrison Products and/or defendant and the information contains the name of no such person.

Now, the information in this respect just states that this shipment was made, the shipment which was supposed to be defective and which was supposed to be covered by a guarantee given under the Food and Drug Act based on interstate commerce, that shipment went from San Diego to Hollywood and there it stopped. There is no other allegation about it. This particular shipment so far as the allegations are concerned was intrastate so far as it ever went, so far as it ever traveled, so far as the information is concerned, and it states.

Now, they intended to say, the information by these allegations, that on that day of the shipment and before and after that Richard Harrison Products was engaged in the business of interstate commerce with this sort of merchandise, not that this shipment was ever to go there. There is no statement that it had ever been ordered to go there, no statement that it was ever contemplated to go interstate, no statement that this was just a part of the route from which it would continue into some other state, naming it, or some other person, naming the person, outside of the state. It just states and leaves it for the inference of the court, for conjecture as to whether or not this particular shipment was ever to be an interstate shipment, or say that this delivery was one, therefore, that would break the guarantee.

In order to save this indictment, the court must make an inference or conjecture that this means that the shipment was intended for interstate commerce and did go into interstate commerce and went out into interstate commerce because Congress has no power to provide against property that goes from one part of the state to another part of the state. For all the indictment is concerned, this could have stopped right in Los Angeles or Hollywood and been consumed there. It could have been that the defendant understood that it was to never go into interstate commerce. It could have been understood that the Richard Harrison Products ordered it for the purpose of putting it over to San Francisco or San Bernardino. The court must presume something in order to make this indictment good.

There are a half-dozen accounts that are good and perfectly legal where this shipment could have gone or could have gone
31 there and then come back to the defendant. The court must presume not that he has performed an innocent act but that he performed a guilty act.

To make the indictment good we must presume the defendant guilty before there is any evidence in the case.

Now, to follow that up with the sections, the section under which this is brought is 331. I am speaking now of the United States Code Annotated sections. In the other form it is 301, but 331 (h) is the one under which the information is drawn, which states as follows:

"The following acts and the causing thereof are hereby prohibited." Now, we will go down to (h). This reads as follows:

"The giving of a guarantee or undertaking referred to in Section 333 (c) (2), which guarantee or undertaking is false, except by a person who relied upon a guarantee or undertaking to the same effect signed by, and containing the name and address of, the person residing in the United States from whom he received in good faith the food, drug, device, or cosmetic; or the giving of a guarantee or undertaking referred to in Section 333 (c) (3), which guarantee or undertaking is false."

Now, that is what they say. This indictment says we gave a guarantee and that guarantee is false and the guarantee
32 is provided for in 333 (c) (2), so we will go to that.

Now, your Honor is perfectly familiar with that sort of a guarantee. That guarantee is to save the wholesaler. The manufacturer gives that guarantee to the wholesaler to save the wholesaler from liability under the Act, and this particular part of the section says: "No person shall be subject to the penalties of subsection (a) of this section." Now it will be down to 2. That will be 333 (c) (2), that is, for having violated 331 (a) (c) (d) if he establishes this guarantee.

So, that guarantee is made in reference to the misdemeanor or crime that would be committed under 331 (a) (c) (d). It is made in reference to nothing else. Its validity, truth or falsity must be measured by what it was intended for.

Now, reading from 331 (a), this is what the wholesaler will be saved from:

"The introduction or delivery for introduction into interstate commerce of any food, drug, device or cosmetic that is adulterated or misbranded." 331 (d) reads as follows:

"The introduction or delivery for introduction into interstate commerce of any article in violation of Section 344 or 355."

So, the guarantee was never intended to cover anything that is intrastate. It was never made for Sections that re-

33 lated to intrastate or it would be unconstitutional. It was made for the purpose of providing protection against the introduction or delivery for introduction into interstate commerce.

So, one element of the offense is that it must be shown that this was a delivery by Harrison Products Company, that this was delivered into interstate commerce, introduced into it, or that Richard Harrison Products delivered for introduction into interstate commerce. Now, that same reasoning is in the Barnes case.

The COURT: Do you have the citation?

Mr. MILLER. The citation is 142 F. (2d) 648. I will only read that one part. This one part related to the two counts of that case which are similar to the two counts of this case, the first and second count of that case. The third count was where Barnes actually delivered, as I recall it, some products himself right into interstate commerce, but they tried to get out of it on the ground that they were a bailee or agent for the other party, and the court did not stand for it, naturally. Now, relating to these first two counts that are similar to this count, I will read point 1:

"Under the present act persons are subject to its penalties for introducing or delivering for introduction into interstate
34 commerce any food that is adulterated or misbranded."

That is very well, but to continue:

"But liability may be avoided if such persons have obtained a guarantee of the person from whom they in good faith received the product, and liability is then imposed upon the guarantor for giving a false guarantee."

Now, this is the point I wanted to call the court's attention to. The falsity described in Section 331 (h) must be defined in terms of the conduct prohibited by Section 331 (a). It must be defined by the delivery. I mean the introduction or delivery for introduction into interstate commerce which is prohibited by Section 331 (a) and (c). So, the gravamen of this offense is the delivery or introduction for delivery into interstate commerce or at least that the particular shipment which was defective must have been intended for or actually used or actually introduced or delivered for introduction into interstate commerce, upon which point this information is wholly silent.

Now, as I said before, they leave it for inference whether it ever reached the state where it made this guarantee an offense. The guarantee was given not to protect a man living in San Francisco when the shipment was made from San Diego to Hollywood to San Francisco. It was meant to protect men who receive
35 goods through interstate commerce. So, when the guarantee was given no contemplation could have been made on the part of Mr. Walsh of the Kelp Laboratories that he was giving a

guarantee whose falsity would be measured by a shipment wholly interstate. He may put any amount of niacinamide in any shipment that went from San Diego to Hollywood and stopped and never break the guarantee. The guarantee never referred to that, according to the language also of Judge Denman in the Barnes case. Now, in the ordinary drawing of an information where does that land us? Under Rule 7-C of the federal rules of criminal procedure the indictment or information it says shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. That is just putting into language partially the old rule in the cases prior to the making of that rule. You have got to state the facts definitely in plain language, not leave it for inference or argument, not leave it for presumption.

Let us see what is said in Asgill v. United States, 60 F. (2d) 780. I am reading from the body of the case on page 784:

"While given full effect not only to the letter but to the spirit of the statute, it must be read in connection with the Sixth Amendment to the Constitution, which requires that the defendant be informed of the nature and cause of the accusation, this in-
36 formation to be set out through an indictment by the grand jury as guaranteed in the Fifth Amendment. Neither the statute nor the decisions was or were intended to qualify or amend, nor could they qualify, amend, or set aside these provisions of the Constitution.

"No offense is so easily charged and so difficult to be met unless the defendants are fully informed of the facts upon which the State will rely to sustain the indictment. While technical objections to indictments are not to be sustained, substantive and substantial facts should be alleged." I will drop down a few lines:

"As stated in Pettibone v. United States, 37 Law Edition 419: The general rule in reference to an indictment is that all the material facts and circumstances embraced in the definition of the offense must be stated, and that, if any essential element of the crime is omitted, such omission must be supplied by intendment or implication. The charge must be made directly, and not inferentially, or by way of recital," quoting several United States Supreme Court cases.

Then, more in line or just as in line is the Moens case. I will
not read from it because the principle involved is too plain.
37 That is the case of Moens v. United States, 267 F. 317.
That case puts the measurement this way. To test the information or indictment it is provided if all facts stated in the indictment could be true and yet the defendant may not be guilty of the offense charged.

If you place that construction on this information all the facts may be true and yet the defendant may be perfectly innocent.

The COURT. Well, that is the usual test.

Mr. MILLER. Yes. Now, there is one case under this Food and Drug Act where the shipment was wholly intrastate where there is no allegation in the indictment or no reference before the jury or court that the merchandise in question went solely intrastate. In fact, there are several cases which presume this and that, but in each case where anything is said about the question that might otherwise throw some enlightenment on it, the indictment definitely alleges that the shipment was made to some point in another state, all the facts before the jury and the court stated definitely that the shipment did go to another state and, having that before the court, the court had a right to say that that was intrastate, and if those cases should be considered, I will ask the court to—there is one case in the Ninth Circuit Court of Appeals. I don't have the citation, but it is Wilson Milling Company vs. Cardoff.

In that case the shipment was from some place in Idaho
38 to another place in Idaho and the question came up in that case as to whether there was a breach of the Food and Drug Act, although it was a civil case. The court said there was no offense charged in that just because the purchaser, that is, the distributor who was making a product, just because the purchaser intended to use it in interstate commerce did not break the Food and Drug Act.

Now, in considering the cases which contain statements that might have some bearing if they were not obiter dicta statements, I ask the court to recall the premise laid down in Osaka Shosen v. United States, 81 L. Ed. 532:

"It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected but ought not to control the judgment in a subsequent suit when the very point is presented for decision."

Now, here is this very point presented for decision. If other cases are quoted, I would ask the right to reply.

Mrs. GRAYDON. If the court please, the government is firmly of the opinion that when goods covered by a guarantee are shipped by the guarantor to a purchaser who is engaged in interstate commerce that the law has been violated.

One case, the Glaser, Kohn & Co. v. United States in
39 224 Fed. 84, a Seventh Circuit Court case, the court said in part in the opinion:

"With regard to the objection that the transaction does not, so far as plaintiff in error is concerned, come within interstate

commerce, plaintiff in error does not in its brief include it among the errors relied on. We are, however, satisfied that the point is not well taken. Steele-Wedeles Company was a wholesale grocer engaged in interstate commerce, as plaintiff in error well knew. By selling and delivering the preserves to that corporation upon the terms of the guarantee, it deliberately placed them in interstate commerce channels."

Now, in that particular case there was an interstate shipment of the goods in question but it seems to the government that that would not necessarily be a requirement under the words used in the opinion that by selling and delivering to a corporation upon the terms of the guarantee, it deliberately places them in interstate commerce channels.

The similar issue was raised in the case of United States v. Charles L. Heinle Specialty Company, 175 Fed. 299. This is a District Court case. Quoting from the opinion by that court:

40 "There is nothing in the act to indicate that there is an effort on the part of Congress to regulate the manufacturing, selling or delivering of any articles of food within the states. The act is intended to prevent adulterated and misbranded foods from being sold in interstate commerce, nothing more; and in order that this may be accomplished it prohibits the party who makes or manufactures the food, and who knows what it contains, from falsely assuring an innocent purchaser that its quality and dress lawfully entitles him to sell the commodity in interstate commerce. Such a certificate, made by a defendant expressly under the provisions of the act, if false, could have been made with no purpose other than to defeat the object of the act. This prohibition is obviously essential to the enforcement of one of the important powers with which Congress is entrusted, to wit, the regulation of interstate commerce."

This, of course, is the act of 1938 that we are dealing with, which is a rewritten old 1906 act and in which the best features of the 1906 act were retained.

As pointed out in United States v. Dotterweich, 320 U. S. at 277, at page 280, in which the court said:

41 "The Food and Drugs Act of 1906 was an exertion by Congress of its power to keep impure and adulterated food and drugs out of the channels of commerce. By the act of 1938, Congress extended the range of its control over illicit and noxious articles and stiffened the penalties for disobedience."

In the old act the guarantor was substituted for the shipper when the shipper had shipped in interstate commerce and under the new act we have this new section which makes the guarantor liable for giving the guarantee itself, which is not included in

the old act, and the Congress thus made the giving of this particular kind of false guarantee an offense which is independent of the introduction in interstate commerce of the illicit articles by the guarantee.

To come within the scope of 21 U. S. Code 331 (h), the one that refers to the false guarantee, the false guarantee must meet the requirements of 21 U. S. Code 333 (c) (2), that is, it must be of such character that it could be used as a defense by the recipient in the event he ships in interstate commerce the goods to which it pertains. The prohibition against the giving of such a guarantee is absolute and independent of whether the recipient has actually violated 21 U. S. C. 331 (a) by shipping the article interstate in reliance upon the guarantee.

This principle has been recognized by several law writers:

42 "The act of giving a false guarantee was not made into a crime by the old law although under the law of 1906 the guarantor could be prosecuted for adulteration of goods or misbranding if the guarantee turned out to have been false. However, there was no penalty provided simply for the giving of a false guarantee as is provided in 1938 act."

Again in the case of the United States v. Dotterweich, in 320 U. S. Fed. 277, at page 280, the court said:

"The purposes of this legislation thus touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond health protection. Regard for these purposes should infuse construction of the legislation if it is to be treated as a working instrument of government and not merely as a collection of English words."

The courts have been unanimous in declaring that a broad and liberal construction should be given to the terms of the Food and Drug Act.

It is, of course, firmly established that the power of Congress to regulate interstate commerce is not limited to the field of transportation alone but encompasses a wide variety of activities which

43 are in themselves intrastate but which affect interstate commerce, and the government refers to Currin v. Wallace, 306 U. S. 1, and U. S. v. Darby, 312 U. S. 100.

Going back to our old Barnes v. United States case:

"Commerce so used in the statute is not confined in meaning to the actual transportation of articles across state lines, but includes the whole transaction of which transporting is a part."

Then, in a case not involving the food and drug cases, but where the similar principle is involved, in United States v. Ferger, et al., 250 U. S. 199; in this case the defendant was charged with violating the federal bill of lading statute by forging and uttering

false bills of lading purporting to represent goods received for interstate shipment.

The bills were negotiable in form, following the standard approved by the Interstate Commerce Commission. The defendant argued that the act of Congress was unconstitutional since the goods were nonexistent and involved no actual interstate shipment.

On this point the court said:

"It is insisted that as there was and could be no commerce in a fraudulent and fictitious bill of lading, therefore the power of Congress to regulate commerce could not embrace such pretended bill. But this mistakenly assumes that the power
44 of Congress is to be necessarily tested by the intrinsic existence of commerce in the particular subject dealt with, instead of by the relation of that subject to commerce and its effect upon it. We say mistakenly assumes, because we think it clear that if the proposition were sustained it would destroy the power of Congress to regulate, as obviously that power, if it is to exist, must include the authority to deal with obstructions to interstate commerce and with a host of other acts which, because of their relation to and influence upon interstate commerce, come within the power of Congress to regulate, although they are not interstate commerce in and of themselves. It would be superfluous to refer to the authorities which from the foundation of the government have measured the exertion by Congress of its power to regulate commerce by the principle just stated, since the doctrine is elementary and is but an expression of the text of the Constitution."

In the same case the court said further:

"Nor is the situation helped by saying that as the manufacture and use of the spurious interstate commerce bills of lading were local, therefore the power to deal with them was exclusively
45 local, since the proposition disregards the fact that the spurious bills were in the form of interstate commerce bills which in and of themselves involved the potentiality of fraud as far-reaching and all-embracing as the flow of the channels of interstate commerce in which it was contemplated the fraudulent bills would circulate."

Therefore, in view of the cases cited the government submits that such authorities clearly uphold the power of Congress to strike at the menace to interstate commerce such as in the case under consideration here, and it is the government's view that through Section 331 (h) of Title 21 Congress has unequivocally chosen to exercise that power. It should be noted, however, that the other sections prohibit acts which do not necessarily relate to the actual interstate shipment of goods. These are subsections d, f, i, j, and

1 of Title 331. There are many similar cases, but those are the leading cases.

The Attorney General's department has taken the stand and has stated, too, that it is the position that 21 U. S. C. 331 (h) is designed to reach just the situation where a false guarantee of compliance with the Federal Food, Drug and Cosmetic Act is given in connection with an interstate transaction involving a food, drug, device, or cosmetic. Where it can be established that there is a reasonable likelihood that the adulterated or misbranded article covered by the guarantee will enter the channels of inter-
46 state commerce, it is within the power of Congress to prosecute the guarantor.

Of course, in the information it is charged that the consignee, Richard Harrison Products Company, prior and subsequent to the date of February 24, 1945, was engaged in the business of introducing and delivering for introduction into interstate commerce quantities of a food labeled as described in the information which had been supplied by the defendant. There is no particular interstate shipment charged but there is the allegation that this food has been shipped both before and after the date of the guarantee.

The COURT. At this time we will take a short recess.

(Short recess.)

The COURT. Is there anything further, Mrs. Graydon?

MR. MILLER. Very little, if the court please. The first decisions cited by counsel were situations where a shipment went actually interstate. It was so alleged in the information and so proved at the trial. I am speaking of the Kohn case. There the wholesaler shipped the merchandise from Chicago to Rock Springs, Wyoming, and the information so charged; and in the Heinle Specialty Company case where there was a demurrer the indictment stated in so many words that the dealer sold the same into interstate commerce and the shipment in question that was defective was shipped in interstate commerce.

In the Barnes case the first two counts were on guarantee
47 and on those I quoted the court's expressions in my argument which stated that 331 (h) must be confined in terms of the conduct prohibited by 331 (a) which is that the goods were for introduction or for delivery and introduction into interstate commerce.

I refer to the expression quoted by counsel to the effect that interstate commerce does not include just the actual going over the state line but it includes the whole transaction of which this is a part. Now, that was quoted not in relation to the two counts on guarantee. The court made that expression relative to the last

count where Barnes was charged with himself shipping, not in giving a guarantee. He was charged with introducing into interstate commerce, being a shipment going from Gardena, California, to Portland, Oregon.

Relative to the general definitions of how broad interstate commerce may be relative to this, that, and the other thing, including bills of lading or this act, it is not so directly in point in this case.

We are not trying to say that the whole thing is unconstitutional because it does not relate to interstate commerce at all. Maybe we could, but we are not raising that point. We are limiting in this case—not we are limiting—we are limited by the act itself and by the conduct itself and the act in this case does not go any further than just this. This guarantee is to be given for
48 having violated Section 331 (a) and (d).

The guarantee relates by definite express words of the statute, and that is what the Barnes case said, that it is defined by and relates to Section 331 (a) and (d).

Now, to go to 331 (a), there it says for the introduction of the thing prohibited, the introduction or delivery for introduction into interstate commerce and (d) has the same language, so that the general theory of how broad Congress can go is not in question here. The fact in question here is how far did this statute go, and the statute only went so far that the goods must be shown to be those that did go or were intended to go for delivery for introduction into interstate commerce or for delivery for introduction into interstate commerce and neither of those facts are alleged in this case and can only be drawn unlawfully and against the law by inference, again intendment or presumption that a man is guilty instead of innocent.

Decision

The Court. It is a very close question here raised. Unless the act can be justified under the interstate commerce laws of the Consituation, of course it is unconstitutional. Probably the most discussed and analyzed constitutional provision is the one on interstate commerce. My recollection of the first case was Gibbs v. Hogan. Since the enactment of the Fair Labor Standards Act there has been a renewed discussion and a great number of
49 decisions construing the interstate commerce application to various facts. This court is bound by the decisions of the Supreme Court of the United States in all of those matters.

Under the Fair Labor Standards Act there seems to be no limit to the extension of that particular act of Congress on the questions raised as to how it is extended. One of the very late decisions is Borden Company v. Borella, 325 U. S. 679. In

that case the Borden Company had its principal offices in New York. It owned and operated an office building in which 58 percent of the rental space was used for its central office for production of goods for interstate commerce, although the goods were actually produced at plants located elsewhere. Now, there were no goods at all manufactured or placed in interstate commerce in the state of New York.

The Supreme Court, with the vigorous dissent by the Chief Justice of the United States, held that it was not necessary to produce any goods for interstate commerce if the company managed its business from the state employees in that office and in that building—they were held engaged in the production of goods for interstate commerce although no goods were produced for interstate commerce in that state. Chief Justice Stone said in part in his dissent:

"The fact that it is convenient or even necessary for the president of the company to ride in an elevator does not seem to me to meet the requirement of the statute that the occupation must be one necessary to the physical process of production. The statute includes those who are necessary to that process, but it does not also include those are necessary to them. The manufacturing process could proceed without many activities which are necessary or convenient to the executive officers of a manufacturing company but which do not in any direct or immediate manner contribute to the manufacturing process; as did the services rendered in Kirschbaum Company v. Walling, supra.

"The services rendered in this case would seem to be no more related, and no more necessary to the processes of production than the services of the cook who prepares the meals of the president of the company or the chauffeur who drives him to his office. McLeod v. Threkeld, 319 U. S. 491. All are too remote from the physical process of production to be said to be, in any practical sense, a part of or necessary to it. I would reverse the judgment. Mr. Justice Roberts join in this opinion.".

There is another opinion, and I do not have the citation at hand, but it was rendered about the same time, in which the Supreme Court held that certain goods were produced in the city of New York and sold to a company and the second company placed the goods in interstate commerce. The manufacturing company put no goods in interstate correce, merely sold them to another company which in turn did place them in interstate commerce.

The Supreme Court for the United States in another case hold that a janitor of a building who was not employed by and had no connection with the company that had rented space in the build-

ing and was engaged in interstate commerce, that the janitor was engaged in production of goods for interstate commerce and came under the Fair Labor Standards Act.

In Warren-Bradshaw Drilling Company v. Hall, 317 U. S. 88, an independent contractor who drilled holes in the ground to produce oil and had no other connection with the oil company or the production of oil for interstate commerce and did not produce oil for interstate commerce except that it drilled the holes and was paid for that particular operation, it was held that the employees of the independent drilling company were producing goods for interstate commerce and came under the provisions of the Fair Labor Standards Act.

In Jewell Ridge Coal Company v. Local 6167 in 325 U. S. 161, the Supreme Court went so far as to hold null and void a collective bargaining agreement, again because of the Fair Labor Standards Act. There was dissent from the majority opinion by
52 the Chief Justice, Mr. Justice Roberts, and Mr. Justice Frankfurter.

Again the Supreme Court of the United States in 10 East 40th Street Building, Inc., v. Callus, et al., in 325 U. S. 578, held:

"Maintenance employees of a typical metropolitan office building, operated as an independent enterprise, which is used and to be used for offices by every variety of tenants, including some producers of goods for commerce, held not to have such a close and immediate tie with the process of production as to be deemed engaged in an occupation necessary to the production of goods for commerce, within the meaning of Section 3 (j) of the Fair Labor Standards Act, and therefore not covered by the act."

Mr. Justice Frankfurter wrote the opinion. The Chief Justice Stone referred to his opinion in the Borden v. Borella case and stated that his views there would control his decision in this case. Mr. Justice Murphy dissented.

These few cases are mentioned to indicate the flux of the law, and somewhat the uncertainty as to just what extent the Supreme Court of the United States, which controls all of the decisions of this court, have found in these particular cases.

Now, will the Supreme Court extend or interpret the particular sections of this particular Food and Drug Act as they
53 have the Fair Labor Standards Act?

There are those who contend there is nothing left for the states in the way of intrastate commerce. A farmer who brings his potatoes to sell in the city could probably be charged with the knowledge that some of those potatoes are going into interstate commerce. The same is true of eggs or any other products that are farmed.

The information in the case before the court alleges that Richard Harrison Products was engaged in the business of introducing and delivering for introduction into interstate commerce quantities of food labeled as aforesaid which had been supplied by the said defendant. Therefore, the sole issue under this motion before the court is whether or not packages delivered under the act to Richard Harrison Products by the defendant Michael Walsh, an individual trading as Kelp Laboratories, which might never go into interstate commerce—the mere fact that they might place these particular packages in interstate commerce is sufficient according to the contention of the government.

It is the government's position that it is not necessary to follow the particular shipment here by the defendant into the channels of interstate commerce that they might rest in Hollywood, having been shipped from San Diego, and be sold locally to a drug store or some other purchaser in Hollywood; that is a violation
54 of the statute because some other packages were shipped in interstate commerce. The information alleges that similar packages had been shipped and labeled similar to the particular one before the court by the Richard Harrison Products.

I believe you will all agree that it is a very close question. There is no decision exactly in point. There is a distinction between the interpretation of the Fair Labor Standards Act and this particular Pure Food and Drug Act in that the court is now confronted with the statute, Section 333, Title 21 U. S. C. A., which provides:

"Any person who violates any of the provisions of Section 331 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than $1,000, or both such imprisonment and fine; but if the violation is committed after a conviction of such person under this section has become final, such person shall be subject to imprisonment for not more than three years, or a fine of not more than $10,000, or both such imprisonment and fine."

We all know that criminal statutes must be strictly construed and shall not be extended by the courts so as to brand individuals as criminals unless there is clear authority under the law to do so.

55 The government asks this court to assume that the particular shipment in question and described in the information will be placed in interstate commerce and thus bring the defendant within the terms of the act. I do not believe that it is the policy of Congress or of the courts to extend criminal statutes or to anticipate acts which are not criminal at the time and which might never become criminal in order to find the

defendant guilty. Such an interruption of business would do violence to all the civil rights of an individual.

Courts are instituted to not only enforce the law against those who violate it but to protect those who have not violated the law even charged with an offense.

The court has spent considerable time reviewing this particular law when the court tried the case of Barnes. That is found in 142 Fed. (2d) 648. Barnes was found guilty in my court and the decision was affirmed by the Ninth Circuit.

The motion to dismiss on all the grounds urged by the defendant will be granted and exception will be allowed to the government.

The court will recess until 2:00 o'clock.

56 [Reporter's certificate to foregoing transcript omitted in printing.]

57 [File endorsement omitted.]

In the District Court of the United States within and for the Southern District of California, Southern Division

Information No. 8987

UNITED STATES OF AMERICA

vs.

MICHAEL WALSH, AN INDIVIDUAL, TRADING AS KELP LABORATORIES

Viol.: USC., Title 21, Secs. 331 (h); 333 (a); 342 (b) (1); 343 (a).

Order dismissing information

Filed Sept. 18, 1946

The motion filed herein on June 14, 1946, to dismiss the information came on regularly for hearing on July 8, 1946, due notice having been given of the time for the hearing of said motion and the hearing thereof having been continued by consent of defendant and the United States District Attorney to July 11, 1946, and defendant, by Eugene W. Miller of Miller, Higgs, Fletcher and Glen, his attorneys, having argued said motion and submitted his authorities, and the United States District Attorney by Betty Marshall Graydon having argued said motion and submitted her authorities on behalf of the United States of America and the matter having been submitted to the Court,

It is ordered that the information herein be dismissed on the grounds that it does not state facts sufficient to constitute an offense against the United States under the Federal Food, Drug and Cosmetics Act.

Dated: Sept. 18, 1946.

J. F. T. O'CONNOR,
Judge.

Approved as to form:
ARTHUR LIVINGSTON.

58 In the District Court of the United States

[Title omitted.]
[File endorsement omitted.]

Notice of appeal

Filed Oct, 17, 1946

The United States of America, by its attorneys, J. Howard McGrath, Solicitor General, and James M. Carter, United States Attorney for the Southern District of California, hereby appeals to the Supreme Court of the United States from the judgment of the United States District Court for the Southern District of California (Southern Division), entered September 18, 1946, dismissing the information against the defendant, Michael Walsh, an individual, trading as Kelp Laboratories, charging him with having violated Section 301 (h) of the Federal Food, Drug, and Cosmetic Act of June 25, 1938 (c. 675, 52 Stat. 1040, 21 U. S. C. 331 (h)), in that he gave to Richard Harrison Products of Hollywood, California, a concern engaged in introducing and delivering for introduction into interstate commerce quantities of a food supplied by the defendant, a continuing guaranty that no food, drug, device or cosmetic shipped or delivered to Richard Harrison Products by the defendant would be adulterated or misbranded within the meaning of the Act, which guaranty was false in respect of a shipment of food thereafter consigned by the defendant
59 to Richard Harrison Products, in that such food was adulterated and misbranded within the meaning of the Act.

Dated October 17, 1946.

J. HOWARD MCGRATH,
Solicitor General,
Department of Justice, Washington, D. C.
JAMES M. CARTER,
United States Attorney,
Los Angeles, California.

60 In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

Stipulation as to designation of record on appeal

Filed Nov. 19, 1946

It is hereby stipulated, by and between counsel for the parties in the above-entitled action, that the Clerk of the United States District Court for the Southern District of California make a Transcript of Record to be filed in the Supreme Court of the United States, pursuant to appeal in the above-entitled cause, and that the said Transcript of Record include the following documents:

1. Information.
2. Motion to Dismiss Information.
3. Complete transcript of proceedings before the Honorable J. F. T. O'Connor, on July 11, 1946, including argument, statement and rulings by the Court.
4. Order dismissing Information, entered September 18, 1946.

61 5. Notice of Appeal.
6. Jurisdictional Statement.
7. This Stipulation.

Dated: November —, 1946.

JAMES M. CARTER,
United States Attorney,
ERNEST A. TOLIN,
Chief Assistant U. S. Attorney,
ARTHUR LIVINGSTON,
Assistant U. S. Attorney,
Chief of Criminal Division.

By Arthur Livingston,
ARTHUR LIVINGSTON,
Assistant U. S. Attorney,
Attorneys for Plaintiff and Appellant.

MILLER, HIGGS, FLETCHER & GLEN,
By Eugene W. Miller,
EUGENE W. MILLER,
Attorneys for Defendant and Appellee.

62 In the District Court of the United States

[Title omitted.]

Certificate of clerk

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 61 inclusive contain full, true, and correct copies of the Information; Motion to Dismiss Information; Notice of Motion to Dismiss; Reporter's Transcript of Proceedings on July 11, 1946; Order Dismissing Information; Notice of Appeal and Stipulation as to Designation of Record on Appeal and the Original Jurisdictional Statement which constitute the record on appeal to the Supreme Court of the United States.

I further certify that a copy of the Notice of Appeal was mailed to counsel for the defendant on October 17, 1946, as provided by Rule 37 (a) (1) of the Federal Rules of Criminal Procedure.

Witness my hand and the seal of said District Court this 20th day of November, A. D. 1946.

[SEAL]

EDMUND L. SMITH,
Clerk.

By THEODORE HOCKE,
Chief Deputy Clerk.

63 Supreme Court of the United States

No. 718, October Term 1946

Order noting probable jurisdiction

December 16, 1946

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

65 In the Supreme Court of the United States

Statement of points to be relied upon and designation of record

Filed Jan. 3, 1947

Pursuant to Rule 13, paragraph 9, of this Court, appellant states that it intends to rely upon the following points:

1. The district court erred in holding that the information did not state an offense under the Federal Food, Drug and Cosmetic Act.

2. The district court erred in holding that Section 301 (h) of the Federal Food, Drug and Cosmetic Act does not apply to the giving of a false guaranty in respect of a shipment in intrastate commerce to a consignee who does both an intra- and interstate business, in the absence of an allegation that the shipment, or some part of it, actually entered the channels of interstate commerce.

3. The district court erred in holding that the appellee's giving of a false guaranty, as charged in the information, did not constitute a criminal violation of the Federal Food, Drug and Cosmetic Act, because he was not charged with having given a false guaranty in respect of a shipment moving in or as a part of interstate commerce.

4. The district court erred in granting the motion to dismiss the information.

66 Appellant deems the entire record, as filed in the above entitled case, necessary for the consideration of the points relied upon.

GEORGE T. WASHINGTON,
Acting Solicitor General.

I hereby certify that I have this day served a copy of the foregoing Statement of Points to be Relied Upon and Designation of Record on Eugene W. Miller, Esquire, 729 Bank of America Building, San Diego, California, Attorney for Appellee, by mailing a copy to him at his business address.

GEORGE T. WASHINGTON,
Acting Solicitor General.

Dated at Washington, D. C., this 2nd day of January 1947.

67 In the District Court of the United States

[Title omitted.]

Stipulation correcting reporter's transcript of proceedings

Filed Jan. 11, 1947

It is hereby stipulated between counsel for the parties in the above-entitled action that the reporter's transcript of proceedings, certified by the official reporter on September 6, 1946, may be

changed to correctly state the argument of counsel for the defendant in the particulars as follows:

1. In line 5 on page 3 of said transcript the word "be" may be changed to the word "have."

2. In line 14 on page 5 the word "that" may be inserted after the word "that" and before the word "shipment."

3. Line 20 on page 5 may be changed to read as follows: "Now they intended to say that this shipment went into interstate commerce in the information by these allegations."

68 4. In line 3 on page 6 the word "to" may be inserted after the word "or" and before the word "some."

5. The last sentence of the first paragraph on page 6, beginning on line 4, may be changed to read as follows: "It just so states and leaves it for the inference of the Court, for conjecture as to whether or not this particular shipment was ever to be an interstate shipment and that this delivery was one, therefore, that would break the guarantee."

6. In line 20 on page 6 the word "putting" may be changed to the word "sending."

7. The last 3 lines on page 6 may be changed to read as follows: "There are a half dozen accounts that are good and perfectly legal to where this shipment could have gone from Hollywood, or it could have gone there and then come back to the defendant. To make the information good the."

8. The last sentence in the first paragraph on page 8 may be changed to read as follows: "Now we will go down to (2); that will be section 333 (c) (2), that is, for having violated section 331 (a) or (d) if he establishes this guarantee."

9. In line 25 on page 8 the word "Sections" may be changed to the word "shipments."

10. The first paragraph on page 9 may be changed to read as follows: "So, one element of the offense is that this shipment was delivered by Richard Harrison Products into interstate commerce, introduced into it, or that Richard Harrison Products delivered it for introduction into interstate commerce."

69 11. In line 4 on page 13, after the word "charged" may be added the words: "then the indictment is bad."

12. In line 18 on page 13, after the word "state," and before the word "all" may be inserted the word "or."

13. In line 21 on page 13 the word "intrastate" may be changed to the word "interstate."

Dated: November 21, 1946.

George T. Washington,
GEORGE T. WASHINGTON,
Acting Solicitor General,
JAMES M. CARTER,
United States Attorney,
ERNEST A. TOLIN,
Chief Assistant U. S. Attorney,
ARTHUR LIVINGSTON,
Assistant U. S. Attorney,
Chief of Criminal Division.

By Arthur Livingston,
ARTHUR LIVINGSTON,
Assistant U. S. Attorney,
Attorneys for Plaintiff and Appellant.

MILLER, HIGGS, FLETCHER & GLEN,
By Eugene W. Miller,
EUGENE W. MILLER,
Attorneys for Defendant and Appellee.

(Signed in duplicate.)

[Endorsement on cover:] File No. 51582. Southern California, D. C. U. S. Term No. 718. The United States of America, Appellant vs. Michael Walsh, an individual trading as Kelp Laboratories. Filed November 25, 1946. Term No. 718 O. T. 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1947